Supreme Court, U.S.
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No. 96-1411

In The

Supreme Court of the United States

October Term, 1996

UNITED COMPANIES LENDING CORPORATION,

Petitioner,

vs.

MICHAEL McGEHEE and JOYCE McGEHEE,

Respondents.

On Petition for Writ of Certiorari to the Alabama Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether certiorari review of the Alabama Supreme Court's judgment is proper where: (a) the Alabama Supreme Court's decision is based on independent and adequate state grounds and (b) no federal question is presented?

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STATEMENT OF JURISDICTION

The United States Supreme Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a). In addition, no ground exists for granting the Petition under Rule 10 of the United States Supreme Court Rules.

STATEMENT OF THE CASE

On June 21, 1991, Respondents Michael McGehee and Joyce McGehee ("the McGehees") entered into a consumer mortgage loan with United Companies Lending Corporation ("UCLC"). UCLC makes only conventional (*i.e.*, non-HUD) loans and targets borrowers with credit problems. UCLC charged the McGehees 8% for non-refundable pre-paid finance charges or "points".

Alabama has a consumer protection law (*i.e.*, Alabama Code § 5-19-4(g)) which caps at 5% the amount of "points" that a lender may charge in a consumer mortgage loan.[1] Alabama Code § 5-19-4(g) states in pertinent part as follows:

> (g) Notwithstanding the provisions of this or any other section of this chapter, a creditor may, pursuant to a contract, in a consumer loan or consumer credit sale secured by an interest in real property, charge and collect points in an amount not to exceed five percent of the original principal balance in the case of a closed-end loan or credit sale, or five percent of the total line of credit in the case of an open-end credit plan . . .

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1. Alabama Code §§ 5-19-1, *et seq.* is commonly referred to collectively as the Alabama "Mini-Code".

(App. to UCLC's Petition, E-1). It is undisputed that UCLC's President and legal compliance officer knew about the 5% cap on points well before the McGehee loan was closed. (C. 1398, 937, 1446, 1260, 1262-66, 1279, 1281-82, 1432).[2]

The McGehees filed a lawsuit in the Circuit Court of Mobile County, Alabama against UCLC for violating Alabama Code § 5-19-4(g) (*i.e.*, the 5% points cap). UCLC moved for summary judgment on the theory that UCLC is "exempt" from Alabama's points capping statute by virtue of an alleged Alabama state law "exemption" contained in Alabama Code § 5-19-31(a). The McGehees cross-moved for partial summary judgment on UCLC's "exemption" defense. The Alabama statute which UCLC relied upon, Alabama Code § 5-19-31(a), states in pertinent part as follows:

> (a) The provisions of this chapter [i.e., of the Alabama Mini-Code]. . . shall not apply to any loan, forbearance, credit sale, lease, or other transaction involving an interest in real property, where the creditor is a lending institution which is an approved mortgagee under the provisions of the National Housing Act or is exempt from licensing under this chapter. . . .

(App. to UCLC's Petition, E-1).

The trial court held that UCLC is not "exempt" under § 5-19-31(a) of the Alabama Code. The trial court denied UCLC's summary judgment motion and granted the McGehees' partial summary judgment motion. The Alabama Supreme Court affirmed the trial court and held that UCLC is not "exempt" from Alabama's points capping statute. Specifically, the Alabama

2. References to the clerk's record will be made with a "C" followed by the appropriate page number.

Supreme Court, construing an Alabama statute, held that UCLC is not an "approved National Housing Act mortgagee" under Alabama Code § 5-19-31(a) with regard to its operations in Alabama.

UCLC now argues that the Alabama Supreme Court "misinterpreted" the Alabama state law "exemption" (*i.e.*, Alabama Code § 5-19-31(a)).

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari must be denied because: (1) the Alabama Supreme Court's decision rests on independent and adequate state grounds; (2) there is no federal question presented; and (3) the Alabama Supreme Court correctly interpreted the HUD regulations in the context of the Alabama Mini-Code exemption found in Alabama Code § 5-19-31(a).

REASONS FOR DENYING THE WRIT

I.

THE ALABAMA SUPREME COURT BASED ITS DECISION ON INDEPENDENT AND ADEQUATE STATE GROUNDS.

UCLC concedes that "when a state court's construction of a state statute is based on state law, its construction is conclusive . . .", and that state court interpretations of state statutes are generally immune from review by the United States Supreme Court. (UCLC's Petition, pp. 13-14). However, UCLC argues that the Alabama Supreme Court's decision is "completely based" upon Federal law. (Petition, pp. 8, 13-15). UCLC is wrong.

The Alabama Supreme Court construed *an Alabama statute* (*i.e.*, Alabama Code § 5-19-31(a)) and held that UCLC is not an "approved mortgagee under the provisions of the National Housing Act" with regard to its operations in Alabama. In so holding, the Alabama Supreme Court relied upon the following principles *of Alabama law*: (1) the Alabama Mini-Code was enacted for consumer protection and should be construed to effect that purpose; (2) the Alabama Mini-Code was intended to protect the public by regulating creditors and public benefit statutes must be construed most favorably to the public; and (3) the Alabama law requires that exemptions to a statutory scheme should be strictly construed against the party seeking benefit of the exemption (*i.e.*, UCLC).

Specifically, the Alabama Supreme Court held as follows:

> The Mini-Code was enacted for consumer protection and so should be construed to effectuate that purpose, see, e.g., *Jackson v. CIT Group/Sales Financing, Inc.*, 630 So. 2d 368 (Ala. 1993); *Spears v. Colonial Bank of Alabama*, 514 So. 2d 814 (Ala. 1987); *Edwards v. Alabama Farm Bureau Mut. Cas. Ins. Co.*, 509 So. 2d 232 (Ala. Civ. App. 1986), *cert. quashed*, 509 So. 2d 241 (Ala. 1987); *Derico v. Duncan*, 410 So. 2d 27 (Ala. 1982).
>
> Because the Mini-Code was intended to provide protection to the public by regulating creditors, it should be construed so as to effectuate that public protection. "Statutes intended for the public benefit are to be construed most favorably to the public." *St. Paul Fire & Marine Ins. Co. v. Elliott*, 545

> So. 2d 760, 762 (Ala. 1989); *First Alabama Bank of Dothan v. Renfro*, 452 So. 2d 464, 467 (Ala. 1984); *Gant v. Warr*, 286 Ala. 387, 391, 240 So. 2d 353, 355 (1970); *Employers Ins. Co. v. Johnston*, 238 Ala. 26, 32, 189 So. 58, 63 (1939).
>
> Furthermore, § 5-19-31(a) provides an exemption from the provisions of the Mini-Code and so should be construed strictly against the party seeking the exemption. Exceptions or provisos, which restrict the operation of a statute, "should be strictly construed, and . . . only those subjects expressly restricted should be freed from the operation of the statute," *Pace v. Armstrong World Industries, Inc.*, 578 So. 2d 281, 284 (Ala. 1991).
>
> These principles [i.e., of Alabama law] favor extending the protection of § 5-19-4(g) to an Alabama mortgagor whose Alabama mortgagee is not regulated under the NHA approval procedures and limiting the exemption in § 5-19-31(a) to mortgagees approved to make NHA loans in Alabama.

(App. to UCLC's Petition, C-16).

Any one of the above three state law grounds is sufficient to support the Alabama Supreme Court's construction of the Alabama "exemption" statute (*i.e.*, Alabama Code § 5-19-31(a)). Since the Alabama Supreme Court's decision is based on independent and adequate state grounds, the Petition for Writ of Certiorari must be denied. *Herb v. Pitcairn*, 324 U.S. 117,

125-26 (1945); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Klinger v. Missouri*, 13 Wall. 257, 263 (1871).

II.

THERE IS NO FEDERAL QUESTION PRESENTED BECAUSE THE ISSUE BEFORE THE ALABAMA SUPREME COURT INVOLVED CONSTRUCTION OF AN ALABAMA STATUTE.

The question before the Alabama Supreme Court was one of state law — *i.e.*, whether UCLC is "exempt" from application of Alabama's 5% points capping law under Alabama Code § 5-19-31(a). The Alabama Supreme Court framed the issue presented to it as follows:

> Pursuant to Rule 5, Ala. R. App. P., this Court granted defendant United Companies Lending Corporation ("UCLC") permission to appeal from an interlocutory order denying its motion for a summary judgment and entering a partial summary judgment for the plaintiffs, Michael and Joyce McGehee. By entering the partial summary judgment, the circuit court disallowed UCLC's defense by which it seeks to establish that § 5-19-31(a), Ala. Code 1975, exempts it from the consumer protection provisions known as the Mini-Code, § 5-19-1 to - 31, Ala. Code 1975 — in particular, the 5% limit on discount points imposed by § 5-19-4(g). *The issue, as narrowed on rehearing, is whether a mortgagee that is not approved to make National Housing Act loans in Alabama comes within the provision of § 5-19-31(a)*

> *that "The provisions of this chapter . . . shall not apply to any loan . . . involving an interest in real property . . . where the creditor is a lending institution which is an approved mortgagee under the provisions of the National Housing Act".*

(App. to UCLC's Petition, C-1 to C-2) (emphasis added).

Clearly, the question of whether UCLC was "an approved mortgagee" under Alabama Code § 5-19-31(a) is one of Alabama state law and involved construction of an Alabama statute. UCLC acknowledged in prior briefs that the issue before the Alabama Supreme Court was one of statutory construction of an Alabama law. In UCLC's September 21, 1995 Brief to the Alabama Supreme Court UCLC stated that this case "involves a question of first impression for this Court [*i.e.*, the Alabama Supreme Court] *about the construction of Section 5-19-31 of the Mini-Code.*" (App. 1a) (emphasis added). And, in UCLC's Petition for Permission to Appeal from the trial court's interlocutory order (*i.e.*, filed by UCLC in the Alabama Supreme Court on May 24, 1995) UCLC represented to the Alabama Supreme Court that "[t]he issue before the Court [*i.e.*, the Alabama Supreme Court] is strictly one of statutory construction." (App. 2a).

UCLC knows that the question before the Alabama Supreme Court was an Alabama state law question. Indeed, UCLC represented to the Alabama Supreme Court that the "controlling" question is one of Alabama state law — *i.e.*, whether UCLC was exempt from Alabama's points capping law under Alabama Code § 5-19-31(a):

II. *THE CONTROLLING QUESTION OF LAW*

This petition involves the following controlling question of law:

> Does *Alabama Code* § 5-19-31 exempt "any" mortgage loan made by a National Housing Act mortgagee from the operation of *Alabama Code* § 5-19-4(g), or only a loan which is actually made under one of the insured programs outlined in the National Housing Act?

(App. 2a).

UCLC's representation to the United States Supreme Court that an important federal question is presented is contrary both to the record and to the representations UCLC made to the Alabama Supreme Court in prior briefs. There is no controlling federal question presented, and no statement by UCLC can alter this fact. Thus, the Petition for Writ of Certiorari must be denied. Sup. Ct. R. 10.

III.

THE ALABAMA SUPREME COURT CORRECTLY INTERPRETED THE HUD REGULATIONS IN THE CONTEXT OF THE ALABAMA MINI-CODE EXEMPTION FOUND IN ALABAMA CODE § 5-19-31(a).

UCLC argues that the Alabama Supreme Court "misinterpreted" the HUD regulations relating to mortgagee approval. UCLC is wrong. In fact, even a cursory examination of UCLC's argument reveals that its argument is misleading.

Prior to a 1996 HUD amendment to 24 C.F.R. § 202.12(m), HUD required that each UCLC branch receive separate HUD approval and that an annual fee for each approved branch had to be paid. (24 C.F.R. §§ 202.12(k) and (m) and C. 852). UCLC has *never* had separate branch approval for the branch where the McGehee loan was closed or for any of its other branches in Alabama. This fact is undisputed. (C. 240, 246, 1210, 1018, 1030, 602-03, 618, 633, 640, 372, 455, 657-58).

The Alabama Supreme Court, applying the rules of statutory construction to the Alabama Mini-Code exemption, and after reviewing the HUD regulations *in effect in 1991* when the McGehees' transaction occurred, found that UCLC was not entitled to an exemption from Alabama's Mini-Code on the theory it was an "approved mortgagee" for purposes of its Alabama operations because it did not have *any* branch approval for *any* of its Alabama offices. (App. to UCLC's Petition, C-7 to C-17).

UCLC relies very heavily, if not exclusively, upon a 1996 HUD rule change which amended 24 C.F.R. § 202.12(m), the HUD regulation which formerly required separate branch office approval. (Petition, pp. 6-7, n.4). In reality, the 1996 rule change actually *supports* the Alabama Supreme Court's conclusion that UCLC was not an "approved mortgagee" with respect to the McGehee loan.

The effective date of the rule change is *August 9, 1996.* 61 Fed. Reg. 36, 452 (1996). The McGehee loan was closed *in June, 1991.* (C. 601-605, 1203, 1336, 1386). Thus, the aforesaid rule change occurred over five years *after* the McGehee loan was closed! This fact is very significant and is perhaps the most compelling evidence that the Alabama Supreme Court correctly concluded that the applicable HUD regulations required separate branch office approval at the time of the McGehee loan. Indeed,

this rule change demonstrates that prior to August 9, 1996 (*i.e.*, the effective date of the rule change), 24 C.F.R. § 202.12(m) *mandated* separate branch office approval, which is precisely how the Alabama Supreme Court interpreted § 202.12(m) of the HUD regulations.

The following four items, although not exhaustive, are other very significant reasons which UCLC conveniently ignores which provide overwhelming support for the Alabama Supreme Court's conclusion that UCLC was not an "approved National Housing Act mortgagee" in 1991 — *i.e.*, the year of the McGehees' loan — with regard to UCLC's operations in Alabama.

First, UCLC's corporate Rule 30(b)(6) representative acknowledged that branch approval from HUD was required for UCLC to be approved to originate FHA/HUD loans from that branch. (C. 852). As the Alabama Supreme Court recognized in its Opinion, UCLC stipulated that UCLC had no HUD approved Alabama branch offices. (App. to UCLC's Petition, C-10). In addition, it is undisputed that UCLC did not obtain separate approval from HUD to originate HUD loans out of UCLC's Mobile, Alabama branch where the McGehee loan was closed. (C. 246, 1210, 1018, 1030, 602-03, 618, 633, 640, 372, 455, 657-58).

Second, the application which UCLC relied upon as support for its "approved HUD mortgagee" theory clearly and expressly states that UCLC's approval was limited to the "HUD Field Office jurisdiction of New Orleans, La." (C. 240). Under 24 C.F.R. § 202.11(a)(4), a mortgagee's approval can be restricted to the geographic area designated by the Secretary of HUD. Thus, UCLC's "approval" was limited by HUD to the HUD field office jurisdiction of *New Orleans*. (C. 240). The McGehee loan was applied for and closed through UCLC's *Mobile* branch office. (C. 246, 1210, 1018, 1030).

Third, it is undisputed that UCLC has *never* in its entire corporate history originated an FHA, VA or HUD insured loan, and it is undisputed that none of the loans originated by UCLC in its entire corporate history are insured by any agency of the Federal government. (C. 803-04, 811-14, 833, 845-46, 1274-75, 1092, 1098, 1100, 1102, 1204, 1604, 1493). In addition, the McGehee loan is *not* an FHA, VA or HUD loan on which UCLC was a National Housing Act mortgagee, and the McGehee loan is not insured by the Secretary of HUD or any other officer or agency of the Federal government. (C. 671-674, 1029, 1093, 1096-97, 1493).[3]

Fourth, documents relating to the McGehee loan transaction further demonstrated to the Alabama Supreme Court that UCLC knew the McGehee loan was in fact subject to the Alabama Mini-Code, including the 5% points cap. During discovery UCLC was forced to produce document no. 72, which is a "screen dump" of computer-stored information about the McGehees' loan with UCLC. That document from UCLC's own computer contains an admission that the McGehee loan was in fact subject to the Mini-Code, *i.e.*, including the 5% cap on points contained in Alabama Code § 5-19-4(g). That document states in pertinent part: "AL MINICODE Y = Yes". (App. 3a).

UCLC proclaims that the "stability and integrity" of the secondary mortgage loan market is threatened by the Alabama Supreme Court's allegedly "unforeseen" decision. UCLC's argument is nothing more than a patently ridiculous scare tactic.

3. The whole purpose behind obtaining HUD mortgagee approval is to allow a lender to participate in mortgage insurance programs authorized by the National Housing Act. 24 C.F.R. § 202.12. Indeed, UCLC's Rule 30(b)(6) corporate representative testified that the reason a lender obtains National Housing Act mortgagee approval is to be able to "originate, process, [and] close insured FHA mortgages." (C. 811). UCLC can make all of the conventional loans (*i.e.*, non-HUD) loans it now makes without National Housing Act mortgagee approval. (C. 814, 846, 1274-75).

The sky will not fall, nor will the secondary mortgage loan market collapse, because of this case.

There is no support in the record for UCLC's "chicken little" argument. (*See* C. 1-1515). Indeed, there is no evidence that this case will have any impact whatsoever on any creditor besides UCLC. (*See* C. 1-1515). There is no evidence that any other lender attempted to create a sham "HUD approved lender" exemption in order to circumvent Alabama's consumer protection laws. And, counsel for the McGehees is aware of no other lender, other than UCLC, that perpetrated this type of deception. UCLC's scare tactics have no support in the record.

Moreover, there is no support in the record for UCLC's argument that the Alabama Supreme Court's decision was "unforeseen". UCLC implies to the United States Supreme Court that UCLC has relied for years upon an official construction of the Alabama exemption statute (*i.e.*, § 5-19-31(a)) which is contrary to the Alabama Supreme Court's decision. Nothing could be farther from the truth. UCLC has not produced any correspondence from HUD (or from anywhere else for that matter) which states that, based on the following undisputed facts, UCLC is exempt from Alabama's point capping statute because it is a bona fide "approved" HUD lender within the meaning of § 5-19-31(a): From its inception as a corporation, UCLC never ever intended to make a single HUD loan; UCLC in fact has never made a HUD loan in its entire corporate history; none of the loans originated by UCLC in its entire corporate history are or were insured by any agency of the Federal government; the McGehee loan is not an FHA, VA, or HUD loan on which UCLC was a National Housing Act lender; UCLC has not complied with the federal regulations governing what a lender must satisfy in order to be an approved National Housing Act mortgagee; UCLC's "approval" was limited by HUD to the HUD field office jurisdiction of New Orleans,

Louisiana; UCLC did not have branch approval to originate HUD loans out of its Alabama branches; UCLC does not have a written quality control plan as required by 24 C.F.R. § 202.12(j); and UCLC does not have fidelity bond coverage as required by 24 C.F.R. § 202.12(r) acceptable to the Secretary of HUD or insurance coverage approved by the Secretary that assures the performance of HUD approved mortgagee's responsibilities. (C. 240, 803-04, 830-831, 833, 845-46, 848, 877, 1201-02, 1306, 1274-75, 1092, 1098, 1100, 1102, 1204, 1104, 811-814; *See* C. 1-1515, 671-74, 1029, 1093).

The reason why UCLC has not produced any correspondence wherein the above facts were disclosed to and approved by HUD is because such correspondence does not exist. Had UCLC fully disclosed the true facts, HUD would have reached the same conclusion that the Alabama Supreme Court reached — UCLC is *not* an "approved mortgagee" with regard to its operations in Alabama.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari must be denied.

Respectfully submitted,

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APPENDIX A — PAGE VI OF UCLC'S BRIEF FILED SEPTEMBER 21, 1995 IN THE ALABAMA SUPREME COURT

STATEMENT OF THE CASE

This appeal affects the ability of residential mortgage lenders to continue to do business in this state. In its order, the trial court has misconstrued a section of Alabama's "Mini-Code" which, if allowed to stand, will result in immediate, irreparable damage to Petitioner/Defendant United Companies Lending Corporation ("UCLC" or "United Companies") and numerous other entities extending credit to Alabama residents. Unless the trial court's order is reversed, the validity of hundreds of millions of dollars worth of mortgage loans will be called into question.

This appeal involves a question of first impression for this Court about the construction of Section 5-19-31 of the Mini-Code.[1] Under this section, mortgage loans by lenders which have obtained mortgagee approval from the Department of Housing and Urban . . .

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1. Although this Court has not previously decided this issue, the United States District Court for the Northern District of Alabama, in *Dorothy Taylor v. United Companies Lending Corporation, et al.*, Civil Action No. CV-94-AR-2321-E, entered summary judgment in favor of UCLC on its exemption defense. The plaintiff appealed that ruling to the United States Court of Appeals for the Eleventh Circuit. After the Eleventh circuit denied the plaintiff's petition for writ of mandamus on other issues, the plaintiff dismissed her appeal.

APPENDIX B — PAGE 4 OF UCLC'S MAY 24, 1995 PETITION FOR PERMISSION TO APPEAL FROM THE TRIAL COURT'S INTERLOCUTORY ORDER FILED BY UCLC IN ALABAMA SUPREME COURT

II. *THE CONTROLLING QUESTION OF LAW*

This petition involves the following controlling question of law:

> Does *Alabama Code* § 5-19-31 exempt "any" mortgage loan made by a National Housing Act mortgagee from the operation of *Alabama Code* § 5-19-4(g), or only a loan which is actually made under one of the insured programs outlined in the National Housing Act?

If the first portion of this question is answered in the affirmative, then the trial court's order is due to be reversed, and this litigation will be concluded.

III. *REASONS WHY PERMISSION TO APPEAL SHOULD BE GRANTED*

A. A Substantial Basis Exists for a Difference of Opinion on the Controlling Question of Law.

The issue before the Court is strictly one of statutory construction. The trial court's order appears on its face to be contrary to the language of the . . .

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SCREEN 0950 APP NO. 058-798 ACTION

X "X" IF FINAL PAYMENT CALCULATION "X" IF "BOND FOR DEED" LOAN
FINAL LOAN NUMBER 058-036-40601 SELECT 1 1=1ST 2=2ND MORTGAGE
INTEREST NOTE DATE: 62191 FIRST PAYMENT DATE: 80191 TERM: 180 MONTHS

Y Y=WAIVE LOAN FEE $ Y=WAIVE POINTS 8.000% CHARGES: $2972.24
TAX SERVICE FEE 59.50

LIFE INSURANCE TYPE: (SEE <HELP>FOR CODES)
COVERAGE: $
TERM: MONTHS
D.O.B. INS. 1 D.O.B. INS. 2
PLAN S=S/L T=13% F=15% ESCROW (UG) MOS

ESCROWS: $ 691.94
0.15% FILING FEE: $ 52.20

PREMIUM: GROUP LIFE $
ACCID. & HEALTH $
UG / LG $

HH G COVERAGE: Y =YES | AMOUNT $ | TERM YRS | PREMIUM $
TITLE:

M M=MTG S=SIM-COV MTG $ 42000.00 OWNER $ PREMIUM $ 423.50

NTEREST RATE	AL MINICODE	APR	MONTHLY PAYMENT	CASH OUTLAY
14.000%	Y=YES	15.819%	$ 463.45	$ 30616.89

AST PAYMENT	$ 461.03	AMOUNT FINANCED	$ 34800.00
NTEREST	$ 48618.58	TOTAL FINANCE CHARGE	$ 51590.82
OTAL PAYMENTS	$ 83418.58	NOTE AMOUNT	$ 34800.00

TO CALCULATE PRESS <GO>

APPENDIX C — DOCUMENT NO. 72 PRODUCED BY UCLC DURING DISCOVERY